No. 84-1485

Office Supreme Court, U.S.
FILED
JUN 22 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN MORAN,

Petitioner,

v.

BRIAN K. BURBINE,

Respondent.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS,
FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

(List of Counsel on Inside Front Cover)

Pandick Midwest, Inc., Chicago • 454-7600

BEST AVAILABLE COPY

Of Counsel:
DAVID CRUMP, ESQ.
Professor of Law
South Texas College of Law
Houston, Texas 77002

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60601

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland
20878

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco
California 94080

JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Interest of Amici 2

Argument 3

I. THE FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE AND SIXTH AMENDMENT RIGHT TO COUNSEL DO NOT REQUIRE SUPPRESSION OF THE RESPONDENT'S CONFESSIONS. 3

Conclusion 7

TABLE OF AUTHORITIES

Cases

PAGE

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977) 6

Burbine v. Moran, 589 F.Supp. 1245 (D.R.I. 1984) 5

Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985) 5, 6

Commonwealth v. Sherman, 389 Mass. 287, 450 N.E.2d 566 (1983) 6

Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984) 6

Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975) 5

People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964) 6

State v. Hill, 26 Ariz. App. 37, 545 P.2d 999 (1976) 6

United States v. Edwards, 366 F.2d 853 (2nd Cir. 1966) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN MORAN,

Petitioner,

v.

BRIAN K. BURBINE,

Respondent.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS,
FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

This is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Constance L. Messore, Special Assistant Attorney General, State of Rhode Island, Counsel for Petitioner, and Robert Mann, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *Legal Foundation of America (LFA)* is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici well know the problems faced by police officers in their good faith attempts to obtain confessions in criminal cases. The state of this intricate complex of rules compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

THE FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE AND SIXTH AMENDMENT RIGHT TO COUNSEL DO NOT REQUIRE SUPPRESSION OF THE RESPONDENT'S CONFESSIONS.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police,* various state associations of chiefs of police, and the *Legal Foundation of America.* Those briefs have presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement impact of the issues raised by the parties.

Amici urge this Court to reverse the holding of the First Circuit Court of Appeals that the failure of police to inform the respondent, in custody on a breaking and entry charge, that an attorney, contacted by respondent's sister, had telephoned to offer her legal services, vitiated respondent's waiver of counsel at an interrogation regarding an unrelated murder. The telephone call to the Cranston, Rhode Island, police station pertained to a breaking and entry committed in that city, but while in custody for that offense the respondent became a suspect in a murder committed in Providence, Rhode Island, about which its police came to question respondent in Cranston. The latter fact was unknown to respondent's sister or the attorney she had contacted.

To rule, as did the Circuit Court, that a telephone call from an attorney (whose services had not even been requested by the arrestee) regarding a particular offense, forecloses the police

from attempting to question a consenting arrestee about an unrelated crime of murder, presents an unwarranted, intolerable obstacle to the police in the performance of an important function in the protection of the public welfare and safety. This would mean that a person in custody of local police on a single charge could never be questioned by the FBI or any other police agency regarding an unrelated offense or offenses, simply because an attorney selected by an arrestee's friend or relative had contacted the police in relation only to the offense for which the arrest had been made.

Amici know from our experience and studies in the law enforcement field that many offenders have been convicted of prior, unrelated crimes, and, also, that many lesser offenders have committed multiple unrelated crimes. In many instances criminal offenders are drifters or transients, persons who have no roots in the community where they have been arrested. The police frequently have considerable difficulty locating suspected persons and must seek an interview whenever their whereabouts are known, and often their presence in the area is for a short period of time.

Jailhouse interrogations, therefore, are not uncommon, and are very necessary. In the instant case, for example, had the Providence police waited until the respondent had been released from custody in Cranston, he may have gone to another area or state, perhaps never to be located again. In murder case investigations in particular, the police frequently encounter offenders who very probably would repeat such crimes.

Presumably the attorney selected by respondent's sister would have cautioned respondent against giving the Providence police a statement had the attorney been aware of the murder investigation. The fact remains, however, that neither the attorney nor the sister knew that respondent was a suspect in that case. The sister "had no inkling at that time that her brother had been implicated in [a murder]." "Her sole concern

was about the break-in." *Burbine v. Moran,* 589 F.Supp 1245, at 1248. Moreover, the Cranston police themselves had no suspicion as to the murder until after respondent had been taken into custody for the breaking and entry.

We also wish to call attention to the fact that there is no indication in the record or in the First Circuit Court's opinion, 753 F.2d 178 (1985), to suggest that the Providence police knew of the attorney's phone call to the Cranston police station.

The First Circuit has adopted a *per se* rule against interrogation of an inmate by any officers, from any jurisdiction, or for any offense which may have occurred at any time, so long as the suspect remains in custody and an attorney is seeking to contact him. In *Michigan v. Mosley,* 423 U.S. 96, 103, 96 S.Ct. 321, 326 (1975), this Court cautioned that:

> . . . a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make formal and intelligent assessments of their interests.

Coincidentally, *Mosley* also involved a confession for an offense unrelated to the suspect's incarceration and his right to remain silent regarding the offense for which he was arrested.

The First Circuit Court's holding not only constitutes a blanket prohibition upon the police and the creation of immunity to an arrestee, but it also has the effect of precluding him from exercising his right to make an "intelligent assessment" of his own interest. The possible abuses of such a rule are not difficult to envision. For example, the simple notification to the police or the publication for their attention of a list of all the clients represented by an attorney or group of attorneys could effectively prevent the police from ever questioning a suspect in investigations totally unrelated to the offense for which an arrest has been made.

Amici suggest that if the First Circuit's rule is upheld, it would be an unwarranted extension of *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232 (1977). Defendant Williams was interrogated after appearance of counsel about the very crime for which he was arrested, the abduction of a child. That interrogation was by a Des Moines detective charged with investigating the offense giving rise to William's custody. The *Williams* rationale should not be extended to officers of another agency who might interview a suspect about an unrelated crime. Even when a person has been indicted, the police are not prohibited from questioning him regarding another offense. *People v. Stanley,* 15 N.Y.2d 30, 203 N.E.2d 475 (1964); *United States v. Edwards,* 366 F.2d 853 (2d Cir. 1966); *State v. Hill,* 26 Ariz. App. 37, 545 P.2d 999 (1976). The state cases cited in support of the First Circuit's holding (at 753 F.2d 186-187) with the exception of *Commonwealth v. Sherman,* 389 Mass. 287, 450 N.E.2d 566 (1983), did not involve unrelated crimes; their holdings do not apply in the instant case.

The First Circuit Court relied on *Fuentes v. Moran,* 733 F.2d 176 (1st Cir. 1984), not on *Brewer v. Williams, supra.* Nevertheless, the opinion below is an extension of *Brewer v. Williams,* and we believe that to the extent the end result may be determined by *Fuentes,* that decision should be disapproved by this Court by affirming the decision of the Rhode Island Supreme Court.

CONCLUSION

The ruling of the First Circuit Court in this case is an unwarranted and intolerable one, and we urge that it be set aside. We do so even if any credence is accorded the allegation that the Cranston police had misled or tricked the attorney who called, for most certainly the Providence police should not be penalized for any such misconduct. The exclusionary rule should not immunize the guilty from all other prosecutions. Nor should it be used as a device to permanently immunize clients—real or imagined—from all police interrogation contacts in the future. Such a distortion was surely not contemplated by this Court when it adopted the prophylactic rule of *Miranda*.

Respectfully submitted,

Of Counsel:
DAVID CRUMP, ESQ.
Professor of Law
South Texas College of Law
Houston, Texas 77002

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60601

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco
California 94080

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland
20878

JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae